

access channel. If the cable operator can make this showing, he would then be able to pass on the opportunity cost to the programmer. We still agree with the Commission, however, that loss of subscribership is too speculative a cost to be included in the base net opportunity cost formula

B. Placing leased access programmers on a tier does not raise a subsidy issue because it costs the operator nothing.

NCTA also argues that the Commission's proposed formula provides a subsidy because it fails to reflect the value to lessees of being placed on a tier.⁵⁸ First, NCTA suggests that the statute is silent as to channel and tier placement. That argument is implausible; as NCTA itself recognizes, the 1992 Senate Report expressly contemplates the issue of tier placement and expresses the desire that leased access programming not be shunted off to seldom accessed tiers.⁵⁹ Contrary to NCTA's contention, the intent of Congress was not only to make channels available for use, but to ensure delivery of the lessees programming to all or most subscribers.⁶⁰ The language of the 1992 Senate

⁵⁸ NCTA, at 16-17

⁵⁹ See NCTA, at fn. 77 (quoting 1992 Senate Report, at 79, "[i]f programming using these channels are placed on tier that few subscribers access, the purpose of this provision is defeated. The FCC should ensure that these programmers are carried on channel locations that most subscribers actually use.")

⁶⁰ See NCTA, at 29 (stating "[m]andated placement o a tier is also inconsistent with the purposes of leased access. Congress only mandated that operators make channel capacity for use by unaffiliated lessees. it imposed no obligation on operators to include that use within a package of its voluntarily-carried services, or to ensure the delivery of leased programming to all or most of its subscribers on behalf of the lessee.")

Report indicates that Congress believed that random or unregulated channel and tier placement could destroy its purpose.⁶¹ Congress was not concerned about access, for its own sake; it was trying to make that access meaningful by delegating authority to the Commission to assure that most subscribers would be able to see the lessee's programming.

Perhaps more importantly, NCTA's argument is suspect not because of what it includes, but what it omits: namely, that placing a leased access programmer on a tier actually costs the cable operator nothing, and enhances the value of the tier offering for current and to potential subscribers. As such, tier placement is wholly consistent with the purpose of leased access; it requires operators to provide a genuine outlet for programmers, and either maintains or improves subscriber penetration and the corresponding market development of the cable system.

Finally, NCTA contends that because Congress granted the Commission authority to set rates for billing and collection of subscriber revenue, it did not intend that lessees would be carried on a tier.⁶² This argument proves too much. All that can be drawn from the billing and collection provision is that Congress contemplated that some leased access programmers might request carriage as a premium service or because of the explicit nature of the programming be required to scramble its programming. In such cases, Congress simply wanted

⁶¹1991 Senate Report, at 79.

⁶² NCTA, at 29-30

to ensure that cable operators would not be able to circumvent the maximum reasonable rate by charging exorbitant billing and collection fees.

III. Adopting a Formula Based on the Average, rather than Lowest Non-Leased Access Programming Cost Will Yield a Windfall for the Cable Operator.

As a threshold matter, CME would like to emphasize that the Commission's cost-based proposal is not only based on sound economic principles, but appropriately balances the duty to set reasonable rates with the obligation to avoid subsidizing leased access programmers. NCTA's proposal to base the maximum reasonable rate on the average non-leased access rate, suffers from many of the same fundamental mis-conceptions as their analysis of the Commission's proposal. As we argued in Part II of these Comments, it is highly unlikely that a measurable decrease in subscriber revenue will result from the introduction of the kind of leased access programming that affordable rates will spawn. Therefore, a formula that includes an element for lost subscriber revenue will result in a windfall for the cable operator.

NCTA's proposed formula is flawed in just that respect. The economics of cable industry suggest that, despite their avowals to the contrary, operators will choose to replace the channels with the lowest non-leased access programming and opportunity cost. Under NCTA's proposed formula, lessees would be paying an average, rather than a channel-specific rate. As Robert Pickard, the editor of the Journal of Media Economics, details in his critique of this proposal (See Appendix E), NCTA's formula is a profit-maximizing strategy that clearly

produces a windfall for the operators, to the detriment of leased access programmers.

Finally, CME strongly opposes rate averaging between leased access users based on the harm or value of their programming.⁶³ First, it is inconsistent with the Commission's obligation to set maximum reasonable rates. Second, allowing operators to exceed the maximum rate for some programmers, could serve as a proxy for editorial control. It is precisely NCTA's suggestion that this approach will allow operators to negotiate below average rates for more valuable programming,⁶⁴ that raises the specter of editorial control. Diverse, public-spirited programming, if it competes with an affiliated program will not be considered "valuable," nor would programming that the cable operators dislike for whatever subjective and idiosyncratic reason

IV. The Commission Should Expedite the Entry of Leased Access Programmers into the Video Programming Marketplace.

If leased access is to ever become a viable option for independent programmers, and Congress' vision ever be realized, the Commission must craft rules that provide programmers will the maximum flexibility allowed by statute. The entry of independent programmers onto cable systems via leased access has been delayed and frustrated by the operators themselves for more than a decade. It is truly incredible that they now propose that the Commission further

⁶³ See NCTA, at 24.

⁶⁴ See NCTA, at 25.

delay the implementation of leased access. Specifically, CME urges the Commission (1) not to institute a phase-in where bumping would not occur, (2) to reject arguments that first-come, first-serve leasing is contrary to Congressional intent, and (3) to set a compensatory part-time rate by pro-rating the maximum rate with time of day pricing.

First, CME strongly believes that a prohibition against bumping programmers to make room for lessees would essentially reward cable operators for artificially suppressing leased access demand. Even if the Commission were to institute a limited transition period (i.e., three months) in order to minimize disruption to the largest extent possible under the statute, cable systems who are currently at capacity should not be able to refuse lessees carriage indefinitely. Contrary to NCTA's argument that bumping would be contrary to Congress' intent in 1984,⁶⁵ CME believes that the relevant Congressional intent in 1996 is that cable systems should provide access to unaffiliated third parties. Cable operators have been on notice about leased commercial access for the last twelve years. More importantly, however, where bumping would not occur, the Commission's new rules should take effect immediately.

Second, NCTA argues that allocating channel capacity on "first-come, first-served" basis, would prevent operators from considering the nature of the programming in setting rates, terms and conditions that are discriminatory as

⁶⁵ NCTA argues that in 1984 Congress did not require operators to remove any service currently being offered. NCTA, at 27

Congress intended, since capacity would go to the first person in line, regardless of the proposed use.⁶⁶ CME's modified "first-come, first-serve" approach, which would require proration of the single or last leased channel on a system, is an efficient, but effective way of addressing any potential inequity.⁶⁷

Finally, NCTA and Cox Communications both argue vigorously that pro-rating the new leased access formula will yield unreasonable and uncompensatory part-time rates.⁶⁸ CME still maintains that pro-rating the maximum rate with time of day pricing is an appropriate method for establishing part-time rates, so long as the part-time rates for a 24-hour period do not exceed the maximum reasonable rate.⁶⁹ In addition, under the Commission's proposal operators would also be able to collect any additional transactional or administrative costs associated with part-time leasing. Therefore, because operators would be able to recoup all operating, administrative, and opportunity costs consistent with the Commission's full-time leased access formula, a pro-rata calculation of the part-time rate would be fully compensatory.

⁶⁶ NCTA, at 31

⁶⁷ CME, at 25-27.

⁶⁸ NCTA, at 32; Cox, at 22, 23.

⁶⁹ CME, at 27-28.

CONCLUSION

For the foregoing reasons, CME urges the Commission to require that leased access channel capacity be reserved for non-profit programmers and expedite the entry of lessees onto cable systems at reasonable rates and terms, such that, as Congress intended, the use of leased access capacity would be encouraged and the First Amendment goals of diversity and competition achieved.

Respectfully Submitted,



John Podesta

Angela Campbell

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
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Alliance for Community Media
666 11th Street, N.W., Ste. 806
Washington, D.C. 20001-4542
(202) 393-2650

May 31, 1996

APPENDIX A

RECEIVED

MAR 12 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

1511 K Street, NW, Suite 518
Washington, DC 20005
March 12, 1996

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20054

Dear Chairman Hundt,

We are writing on an urgent matter of great importance to our organizations and to the entire nonprofit community. We request that you establish nonprofit educational rates for the leasing of cable channels, an action now under consideration in Docket MM 92-266.

The cable leased-access provisions of the 1984 and 1992 Cable Acts were just part of many government policies designed to encourage diversity of voices in our nation's media and communications system. And as in other mediums, special attention was paid to fostering noncommercial and educational outlets and services.

Special rates for nonprofit organizations for cable's multichannel video services is essential to ensure full public access to the panoply of emerging communications technologies. We believe that only with targeted policies ensuring access to this crucial distribution system will sufficient diversity of educational programming follow, such as local, regional and national channels focusing on literacy, health, the environment, consumer awareness, parenting, science, and culture. Without low-cost access, the ability of noncommercial programming to reach a national audience will be seriously hamstrung, to the detriment of the public's interest in having a diversity of voices and choices.

Our organizations and others provide critical services to the public, but cannot afford to compete with commercial entities. By granting favorable rates to nonprofit educational groups for access to cable systems, you will help us as we strive to enhance the level of civic engagement in communities across the country.

Thank you for your consideration.

Sincerely,

Advocates for Children and Youth
Alliance for Community Media
American Association of School Administrators
American Federation of Teachers
American Speech-Language-Hearing Association
Asian American Arts Alliance
Association of America's Public Television Stations
Association of Independent Video and Filmmakers
Benton Foundation
Boston Computer Society
Boston Film/Video Foundation
Catalyst Project
Center for Media Education
Center for Media Literacy
Center for Alcohol Advertising
Center for Public Interest Law
Center for a New Democracy
Children's Advocacy Institute
Children's Express
Citizens for Media Literacy
Coalition of Women's Art Organizations
Communications Consortium

Communications Workers of America
Community Technology Centers' Network
Computer Professionals for Social Responsibility
Consumer Federation of America
Cultural Environment Movement
Delaware Association of Nonprofit Agencies
Family Resource Coalition
Fairness and Accuracy in Reporting
Government Accountability Project
Institute for the Study of Civic Values
Libraries for the Future
Media Democracy in Action Consortium
National Alliance for Media Arts and Culture
National Assembly of State Arts Agencies
National Association for Family and Community Education
National Association of Artists' Organizations
National Association of Elementary School Principals
National Association of the Deaf
National Association of School Psychologists
National Campaign for Freedom of Expression
National Coordinating Committee for the Promotion of History
National Federation of Community Broadcasters
National Urban League

Newton Television Foundation

OMB Watch

Parents' Choice

Self Help for Hard of Hearing People

Special Libraries Association

Telecommunications for the Deaf

The Television Project

The Women's Center

Women's National Democratic Club

Yale University Family Television Research and Consultation Center

cc:

Commissioner Andrew Barrett, FCC

Commissioner Rachelle Chong, FCC

Commissioner Susan Ness, FCC

Commissioner James Quello, FCC

Meredith Jones, Chief, Cable Services Bureau, FCC

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter Of)	
)	
Implementation of Sections of the)	MM Docket No. 92-266
Cable Television Consumer Protection)	
and Competition Act of 1992:)	CS Docket No. 96-60
Rate Regulation)	
)	
Leased Commercial Access)	

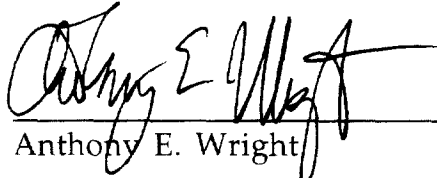
Declaration of Anthony E. Wright

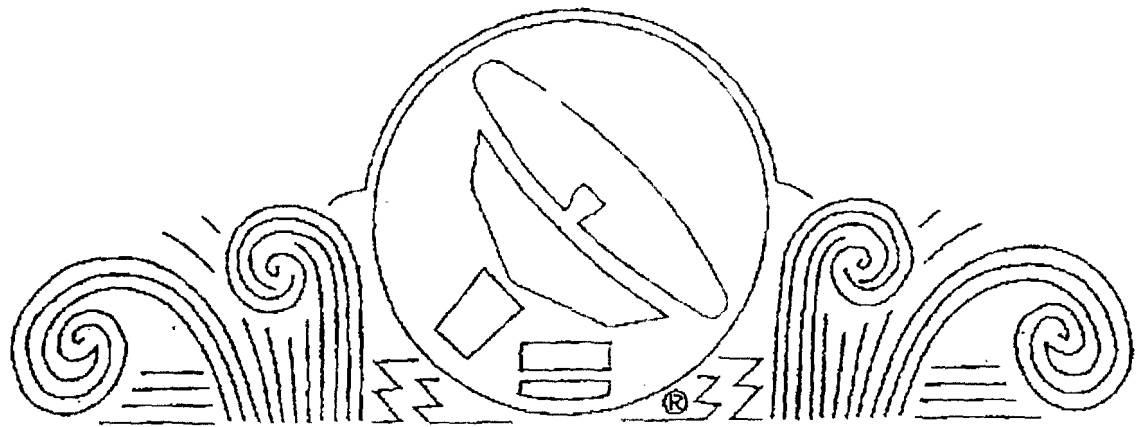
1. I am the same Anthony E. Wright that coordinates the Future of Media Project for the Center for Media Education (CME) and that submitted a Declaration in support of Comments (filed May 15, 1996) by CME in the above-mentioned proceeding.
2. In the May 15, 1996 Declaration, I described how I requested information on leasing channel capacity from ten cable systems. None provided all the information requested, and thus each one violated FCC regulations.
3. In the May 15, 1996 Declaration, I described a phone call with a employee of Jones Intercable of Fort Myers, FL. Subsequently, I did receive a 2-page fax (attached), consisting of a cover page and a part-time rate card. (This is consistent with the verbal communication from the Jones Intercable representative that the system would not lease full-time cable channels, in violation of FCC rules.) Since the system declined to submit any information about the costs of leasing full-time channels, a description of technical costs, an accounting of current unleased capacity, or a sample contract, this cable system (like the others) is in violation of FCC rules.
4. I have received no additional information from the other cable systems. Even with extended time, all ten cable systems are still in violation of FCC rules. Three did not even bother to respond at all.

5. In the May 15, 1996 Declaration, I indicated which four of the ten cable systems sent me a sample leased access contract. On May 30, 1996, I received a phone call from Ed Gallick of the FCC staff, who was interested in obtaining copies of the contracts. I am attaching the three sample contracts I received. (The contracts from two systems owned by TCI were identical.)

I declare under penalty of perjury that the foregoing, and the above-mentioned May 15, 1996 Declaration, is true and complete to the best of my information, knowledge, and belief.

Date: May 31, 1996


Anthony E. Wright



JONES INTERCABLE,®

JIE.™

2931 Michigan Ave. Ft. Myers, FL 33916 P.O. Box 1360 33902
(941) 334-8828 FAX (941) 334-8575

From: Mary Martin

To: Anthony Wright

Pages: 3

Comments: I have enclosed our L.O. rate sheet and a
video production rate sheet. Depending on your needs, we
can customize a package for you. Please feel free to call
me with any questions. Sincerely,
W. May

JONES INTERCABLE,

W-JIC Channel 12 Rate Card - Programming

Jones Intercable W-JIC Channel 12 is a local origination channel which features many locally produced shows, Warner Brothers programming, local newscasts, infomercials, and some nationally syndicated programs.

Times available to air your program change weekly as new shows are added on a regular basis. However, once you sign up for a specific time slot, that time slot remains yours until your agreement ends at which time you have first rights to renew. W-JIC can produce and air your show for as little as \$140 per week for a live 1/2 hour cablecast. This includes a director, an audio person, and a camera person, basic lighting, a basic set, and the cable time. On location production and shows which require editing are based on the rates on our Video Production Rate Card and a quote per show can be given. W-JIC will also promote your show and its airtime a minimum of 30 times per week.

If you are interested in having us cablecast a program which you have produced, the cost for cablecasting are as follows:

1/2 hour program - \$60 per airing which includes a minimum of 30 promos per week for the show (promos air on channels 10 (W-SFM), 12 (W-JIC), and 15 (The Prevue Guide).

1 hour program - \$110 per airing which includes a minimum of 30 promos per week for the show (promos air on channels 10 (W-SFM), 12 (W-JIC), and 15 (The Prevue Guide).

If you are interested in purchasing time on a daily basis, these rates will decrease by \$20 per half hour program and \$30 per 1 hour program. These discounts also apply to purchasing blocks of time on a weekly basis.

If you require more information, please call us at (941) 334-7855.



May 10, 1996

Mr. Anthony Wright
Project Coordinator
Center For Media Education
1511 K Street, NW, Suite 518
Washington, DC 20005

RE: Leased Access Rates

Dear Mr. Wright:

Pursuant to your request dated May 2, 1996, (received in our office on May 3, 1996) enclosed please find rates for leasing channel capacity on our cable system. Also enclosed for your review are a Channel Lease Application and a sample Lease Agreement.

You will note that we have prepared two sets of rates. Please refer to the notation in the lower right-hand corner of each page of the rate schedule. Headend number H1415A is for distribution to our suburban market area; Headend number H1415B is for distribution to the Cities of Grand Rapids and Wyoming.

Once you have had an opportunity to review the enclosed information, feel free to contact me if you have questions or require additional information, or if you would like to apply for carriage on our system.

Thank you for your interest in TCI Cablevision of West Michigan, Inc. We look forward to our further communication.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Tidd", written over a horizontal line.

J. Thomas Tidd
General Manager

/blw
Enclosures



TCI of Lexington, Inc.

May 13, 1996

Mr. Anthony Wright
Project Coordinator
Center for Media Education
1511 K Street, NW
Suite Number 518
Washington, DC 20005

Re: Request of Leased Access

Dear Mr. Wright:

Thank you for your inquiry into leased access time on our system. I am enclosing for your review:

1. Rate sheets that describe the rates for full-time and hourly leased access carriage.
2. A questionnaire to be completed by the leased access programmer; and
3. A form contract for leased carriage.

Please review the enclosed information, and, if you remain interested in leased access carriage on our system. Fill out the questionnaire and return to me. If carriage is available in accordance with your request, we will finalize the contract and send it to you for signature.

Please call me at (606) 268-1123, extension 216, if you have questions.

Yours sincerely,

TCI OF LEXINGTON, INC.

Gordon M. Waters
Business Operations Manager

Enclosures

2544 Palumbo Drive
P.O. Box 55630
Lexington, Kentucky 40555-5630
(606) 268-1123
FAX (606) 269-6990

An Equal Opportunity Employer

CHANNEL LEASE APPLICATION

(Please Type Responses - Use Additional Pages If Necessary)

A. Channel Lease Applicant Identification

1. Legal name of applicant:

2. Any additional names under which applicant is doing business:

3. Address of applicant:

4. Name and telephone number of person to contact:

5. Identify the legal status of applicant (e.g., corporation, partnership, individual):

6. If applicant is a partnership identify all partners; if applicant is a corporation identify all shareholders with which own, legally or beneficially, 10 percent or more of the corporation's voting shares:

B. Nature of Proposed Service

1. Describe in detail the video programming proposed to be distributed on the leased channel:

2. Identify the entity that will produce the programming:

3. Identify the dates and times for which access is sought:

4. For what term do you wish the contract to run? (note: not longer than one year)

C. Technical Criteria

1. Describe in detail applicant's proposed means of physical connection to the cable system and provision of programming (include make and model number of all equipment to be used):

2. Do you request two-way cable system capability (e.g., commercial insertions, subscriber addressability etc.)? If so, describe in detail:

3. If your service will be subscription-based, will there be a direct charge to your service's subscribers? If so, describe the manner in which such subscriber charge will be implemented:

4. Describe the manner in which the proposed service will be marketed to cable system subscribers:

5. Do you request any technical assistance other than as set forth above? If so, describe:

CHANNEL LEASE AGREEMENT

This Agreement is entered into as of _____, by and between _____ ("Lessor"), and _____ ("Lessee").

RECITALS

A. Lessor operates a cable television system serving the community of _____ (the "System").

B. The Lessee desires to lease channel time on the System pursuant to Section 612 of the Communications Act of 1934 and subject to the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual promises and covenants contained in this Agreement, Lessee and Lessor agree as follows:

AGREEMENT

1. Use of Channels. Lessor hereby leases to Lessee channel access on the System (initially on channel ____), whether in its current form or as compressed, modified, digitized, or altered, for the following periods of time: _____.

2. Restrictions on Use. Lessee agrees to be solely responsible for its programming and agrees to utilize the channel time specified herein in accordance with the following:

- (a) Lessee shall utilize the channel in such a manner as to avoid all liability or claim of liability for tortious, negligent, criminal or other acts or omissions including, without limitation, defamation, indecency, obscenity, personal injury, property damage, invasion of privacy, wrongful publicity, violation of civil rights, infringement of copyright (including without limitation music performance rights for any and all performances through to subscribers) and unfair competition;
- (b) No program, production or presentation shall be transmitted unless all appropriate copyright clearances, licenses, or other necessary authorizations have been obtained (including, without limitation, music performance rights for any and all performances through to subscribers).
- (c) Lessee shall not permit any other person or entity, other than Lessor, to use the channel for

any purpose without the prior written consent of Lessor, acting in its sole and absolute discretion.

(d) Pursuant to Section 612(h) of the Communications Act of 1934, Lessee's programming may be subject to the review and approval of Lessor's franchising authorities.

(e) No programming provided by Lessee will be obscene.

3. Regulatory Compliance. Lessee shall comply, and Lessee's programming complies and will continue to comply, in all respects, with all applicable federal, state, or local laws, regulations or decisions, as such laws, regulations, and decisions may be in effect, including without limitation:

(a) The requirements of Part 76, subpart G of the Rules of the Federal Communications Commission ("FCC"), as the same may be from time to time amended, notwithstanding whether such rules are rescinded, superseded, or rendered void by judicial determination.

(b) Any applicable federal, state or local law, regulation, rule or judicial or administrative decision relating to libel, slander, copyright, indecency, obscenity, incitement, privacy, and false and misleading advertising.

Upon Lessor's request, Lessee shall promptly furnish to Lessor all certifications, statements, records, or other information which may be necessary or useful to Lessor to comply with applicable law or to determine Lessee's compliance with this Agreement or in the preparation of any reports or other documents that Lessor may be required or requested to file with any federal, state or local governmental agency.

4. Control of Channels; Subscription Fees. Ownership, control and use of any and all cable television channels and the signal distribution capacity contained within the bandwidth of such channels shall at all times be and remain with Lessor; provided that such use does not materially interfere with the presentation of the principal audio and video portions of Lessee's programming on the channel assigned by Lessor. Lessee shall have no right to any particular channel or to any rights or priorities for further or future access to the System, and Lessor expressly reserves the right at any time and from time to time, upon 30 days' prior written notice to Lessee, to cablecast Lessee's programming on a different channel. Lessor may without limitation: (i) utilize any of the channels of its cable television systems for the transmission of any material; (ii)

enter into agreements for the use of its channels by others; or (iii) make use of any of the channel(s) utilized by Lessee during any time when such channel(s) are not being programmed by Lessee. Lessee shall have no rights to or interest in any of such subscription fees, equipment fees or other fees or charges received by Lessor from any party, including without limitation the System's subscribers.

5. Disclaimer. The System shall have the right to cablecast a message at the beginning and end of Lessee's programming in a form substantially similar to the following:

" [System Name] is required by federal law to make this programming available to its customers.
[System Name] is not affiliated with the programmer, and [System Name] is not responsible in any way for the content of the programming you are viewing."

6. Taxes. Lessee agrees to pay to Lessor, upon presentation of an invoice to Lessee, any excise, franchise, sales, copyright or royalty fees or taxes or any privilege taxes now or hereafter imposed or levied by any association, government or governmental agency upon Lessor by virtue of Lessee's use of the channel under this Agreement.

7. Technical Requirements.

(a) Subject to subparagraph (b) below, Lessee shall be responsible for supplying, at its cost, all facilities (including but not limited to personnel, equipment, licenses, electronics, and all other aspects of production) necessary to produce and deliver Lessee's programming in the form of a standard National Television Standards Committee (NTSC) composite television signal to the System's distribution or headend facilities. Lessee shall pay for and provide maintenance and repair for all such equipment, which equipment shall be of a type suitable for use in connection with this Agreement. Lessee acknowledges that Lessor's headends contain expensive and sophisticated equipment, and Lessee agrees to comply with all reasonable security procedures required by Lessor.

(b) The System shall provide the following technical assistance to Lessee:

Lessee shall compensate Lessor for the foregoing assistance as follows: